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No. 89-1951

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DELTA TRAFFIC SERVICE, INC.,
and ONEIDA MOTOR FREIGHT, INC.,
Petitioners,

v.

APPCO PAPER & PLASTICS CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented For Review

Did the Court of Appeals correctly determine that the filed rate doctrine does not bar referral of undercharge actions to the Interstate Commerce Commission, where the purpose of referral is to determine reasonableness issues left open by *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, rather than to pursue equitable remedies?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
1. The Circuit Court's Reversal of The District Court's Refusal to Refer the Reasonableness Issue to the ICC was in Accord with *Maislin v. Primary Steel*	1
2. The Court of Appeals' Decision Gives Effect to the Exceptions to the Filed Rate Doctrine	3
3. Shippers Need not Pay Undercharges and Then Seek Reparations From the ICC When Reasonableness is in Issue	6
CONCLUSION	10

TABLE OF AUTHORITIES

Judicial Decisions	Page
Branch Motor Express Co. v. W. R. Grace, No. 86-2408-Z, D. Mass., Sept. 27, 1990	5
Brandon v. Holt, 469 U.S. 464 (1985)	4
Caravan v. Supreme Beef Processors, 864 F.2d 388 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 3254 (1990)	6
Delta Traffic Service, Inc. v. Transtop, Inc., No. 89-1662, First Circuit, July 19, 1990	5
Far East Conference v. United States, 342 U.S. 520 (1952)	5
General American Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422 (1940)	5
Keogh v. Chicago & Northwestern R.R., 260 U.S. 156 (1922)	3
Louisville & Nashville R.R. v. Maxwell, 237 U.S. 94 (1915)	2,3
Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. ___, 110 S.Ct. 2759 (1990)	*passim*
Mohasco Industries, Inc. v. Acme Fast Freight, Inc., 491 F.2d 1082 (5th Cir.), *cert. denied*, 419 U.S. 842 (1974)	8
Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976)	5
Overland Express, Inc. v. Bay State Milling Company, No. IP90-707C, S.D. Ind., August 22, 1990	5
Southern Pacific Transportation Co. v. City of San Antonio, 748 F.2d 266 (5th Cir. 1984)	6
Texas & Pacific R.R. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907)	5
United States v. Associated Transportation Co., 505 F.2d 366 (D.C. Cir. 1974)	8
United States v. Western Pacific R.R., 352 U.S. 59 (1956)	5,9

Table of Authorities Continued

	Page
Wescar Freight Systems, Inc. v. Freightliner Corp., CA No. 88-6442-MA, D.Ore., July 19, 1990 ...	5
Administrative Decisions	
Glama Dress Co. v. Mid-South Transportation, 335 I.C.C. 586 (1969)	9
N.I.T.L. - *Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 3 I.C.C. 2d 99 (1986), *clarified*, 5 I.C.C. 2d 623 (1989)	4
Statutes	
49 U.S.C. § 10701(a)	3
49 U.S.C. § 11705(b)(3)	8
49 U.S.C. § 11706(a)	9
49 U.S.C. § 11706(c)(2)	9

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Respondent, Appco Paper & Plastics Co., by its attorney, replies to the petition of Delta Traffic Service, Inc., and Oneida Motor Freight Co. ("Petitioners") for a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit in No. 88-9057, dated January 4, 1990, as follows:

1. The Circuit Court's Reversal of The District Court's Refusal to Refer the Reasonableness Issue to the ICC was in Accord with *Maislin v. Primary Steel*

The Second Circuit merely held that the filed rate doctrine does not preclude a District Court's referral to the Interstate Commerce Commission ("ICC") of issues in a motor carrier rate undercharge action that

implicate the "reasonableness" exception to the filed rate doctrine, as set forth in *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94 (1915). Therefore, nothing in the Second Circuit's decision requires review or correction by this Court.

Petitioners misstate the Circuit Court's decision, at page 4 of their petition, as follows:

> "The Court of Appeals below incorrectly found that an equitable defense to an action at law to collect the filed rate could exist by allowing referral to the ICC."

In fact, the Court of Appeals simply restated existing law, as most recently reaffirmed in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. ___, 110 S.Ct. 2759 (1990), when it concluded:

> "Although courts may not mitigate the filed rate by resort to equitable defenses, *Maxwell* recognized an exception to strict enforcement of the filed rate when adverse findings concerning the reasonableness of a disputed rate have been made by the ICC. *See Id.* Since this exception contemplates some action by the ICC, we do not view the filed rate doctrine as a road-block preventing referral of undercharge actions to the ICC. We find that the district court improperly denied Appco's motion for a stay and referral of proceedings to the ICC." 893 F.2d 472, 475.

The Court of Appeals clearly did not apply an equitable defense to this action. It did nothing more than follow this Court's long established adherence,

in cases too numerous to require citation, to the doctrine that administrative agencies have primary jurisdiction to determine issues entrusted to them.

2. The Court of Appeals' Decision Gives Effect to the Exceptions to the Filed Rate Doctrine

On June 21, 1990, this Court reaffirmed "an important caveat" to the filed rate doctrine, holding:

> "... the filed rate is not enforceable if the ICC finds the rate to be unreasonable."

Maislin, supra, 110 S.Ct., at 2767 (citing and explaining *Louisville & Nashville R.R. v. Maxwell,* 237 U.S. 94, 97 (1915), *Keogh v. Chicago & Northwestern R.R.,* 260 U.S. 156, 163 (1922) and 49 U.S.C. § 10701(a)).

Regrettably, Petitioners have omitted this significant exception to the filed rate doctrine in citing *Maxwell* to this Court, at page 7 of their Petition. This omission cannot be characterized as inadvertent, as this incomplete statement of the filed rate doctrine had been brought to Petitioners' counsel's attention on numerous occasions.

In Footnote 10 of *Maislin, supra,* 110 S.Ct., at 2767, this Court acknowledged that the shipper-defendant before it had requested a determination of the reasonableness of the tariff rates, and that

> "[t]he issue of the reasonableness of the tariff rates is open for exploration on remand."

In Footnote 11 of *Maislin, id.,* this Court further reaffirmed the ICC's statutory right to find a carrier's practices to be unreasonable when such a finding requires merely the application of a "different filed tariff" as distinguished from an *unfiled* tariff.

Within the parameters set by Footnotes 10 and 11 of *Maislin*, the Court of Appeals below properly upheld Respondent's position that:

> "... under the circumstances, collection of undercharges would constitute an unreasonable practice, and that the ICC has primary jurisdiction over the issue of the reasonableness of carrier rates and practices." 893 F.2d 472, 473.

The Court concluded as follows:

> "Since we find that Appco was entitled to a determination by the ICC as to the reasonableness of plaintiffs' practices, we reverse and remand for further proceedings." *Id.*

This result was reached in light of Respondent's answer to the Complaint alleging that:

> "... the collection of undercharges based on the rate contained in the filed tariff would constitute an unreasonable practice in light of the negotiated rate." *Id.*[1]

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[1] Appco's allegation that the collection of the filed rate would constitute an unreasonable practice in light of the negotiated rate was predicated on the law of the case as of August 12, 1987, when its answer was filed. *See N.I.T.L. - Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 3 I.C.C. 2d 99 (1986). On numerous occasions thereafter, the Commission elected not to consider rate reasonableness even when raised by defendants in negotiated rate cases. *See, e.g., Maislin*, 110 S.Ct., at 2767 n.10. In light of this Court's reversal of the Commission's policy in *Maislin, supra*, Respondent will seek leave of the trial court to amend its answer by alleging the unreasonableness of Oneida's rates as well as its practices. Cf. *Brandon v. Holt*, 469 U.S. 464 (1985), wherein this Court upheld the right to amend a complaint to conform to the proof after the law had been changed.

Having raised the issue of reasonableness in its Answer below, Respondent was entitled to be heard on this statutory defense, and the sole forum for such a determination is the ICC. *Texas & Pacific R.R. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 440-442 (1907); *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 433 (1940); *Far East Conference v. United States*, 342 U.S. 570, 574-575 (1952); *United States v. Western Pacific R.R.*, 352 U.S. 59, 64 (1956); *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 305 (1976).

Maislin, supra, did not foreclose such a determination by the ICC. Post-*Maislin* decisions which have referred reasonableness issues to the ICC include *Delta Traffic Service, Inc. v. Transtop, Inc.*, No. 89-1662, First Circuit, July 19, 1990, affirming Section "A" of a pre-*Maislin* decision in the same case reported at 902 F.2d 101, 104-107 (1990); *Wescar Freight Systems, Inc. v. Freightliner Corp.*, C.A. No. 88-6442-MA, D.Ore., July 19, 1990; *Overland Express, Inc. v. Bay State Milling Company*, No. IP90-707C, S.D. Ind., August 22, 1990; and *Branch Motor Express Co. v. W.R. Grace*, No. 86-2408-Z, D. Mass., Sept. 27, 1990.

The District Court's grant of summary judgment to the Plaintiffs below deprived Respondent of its opportunity to present evidence on the issue of the reasonableness of Oneida's rates and practices. This evidence can and will be presented when the case is remanded by the Second Circuit upon a denial of the instant Writ.

3. Shippers Need not Pay Undercharges and Then Seek Reparations From the ICC When Reasonableness is in Issue

At page 7 of their petition, the Petitioners contend that:

> "... The shipper must pay the tariff rate before it can be challenged as unreasonable. [This] is the sole and exclusive remedy for excessive charges on past motor carrier shipments."

The cases cited in support of this proposition do not warrant such a result herein. Therefore, the Second Circuit did not err in allowing referral to the ICC without requiring Respondent to prepay the amounts at issue.

In particular, *Caravan v. Supreme Beef Processors*, 864 F.2d 388 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 3254 (1990), does not provide sound authority for the proposition that shipper defendants in motor carrier undercharge cases may raise reasonableness defenses only by prepaying the alleged undercharges and later seeking reparations in a separate ICC action. The *Caravan* court's rationale on this point was most revealing:

> "... [O]ur decision [rejecting a shipper's reasonableness defenses and granting summary judgment to a plaintiff seeking undercharges] is governed by our opinion in *Southern Pacific Transportation Co. v. City of San Antonio*, 748 F.2d 266 (5th Cir. 1984). There, we overturned a district court's stay of an execution of judgment by two railroads seeking to collect undercharges for shipments of

coal to a city power plant. The district court had granted the stay pending the Commission's determination of the reasonableness of the railroad's filed rates. We stated,

> 'The Interstate Commerce Act . . . entails a balanced and coherent system for the payment and review of rates. The shipper is required to pay the filed rate at the time of shipment but may later seek review and reparations in the I.C.C. The carrier, on the other hand, receives assurance that payment will not be delayed pending review; but the carrier must be prepared to reimburse amounts later found to be unreasonable.' "

748 F.2d, at 274.

The *Caravan* court's analogy to *San Antonio* does not withstand scrutiny. *San Antonio* involved a protracted and complex railroad rate dispute initiated by a shipper's rate reasonableness complaint before the ICC; at issue was which of several rate levels should be paid by the shipper *pendente lite* when each of these rate levels had been found reasonable by the ICC for ongoing movements at various stages of the ten-year dispute. By contrast, the typical plaintiff in a motor carrier undercharge case is bankrupt; there are no ongoing freight movements for which the ICC already has prescribed rates; and the plaintiff generally is *not* "prepared to reimburse amounts later found to be unreasonable" by the Commission.

Significantly, this Court's decision in *Maislin* did not endorse the *Caravan* Court's "pay now, refer later" theory; Primary Steel was not ordered to pay

the amounts in dispute before pursuing rate reasonableness issues below. To the contrary, the procedure suggested by the Fifth Circuit in *Caravan* violates the holding of this Court in *Maislin*, at Footnotes 10 and 11, which recognized and preserved the shipper's statutory right to determination by the ICC of reasonableness issues.

Equally inapposite is Petitioners' citation to *Mohasco Industries, Inc. v. Acme Fast Freight, Inc.*, 491 F.2d 1082 (5th Cir.), *cert. denied*, 419 U.S. 842 (1974), and *United States v. Associated Transportation Co.*, 505 F.2d 366 (D.C. Cir. 1974). Both of these decisions involved attempts by shippers to bring common-law actions for restitution of freight charges they already had paid under filed rates that the ICC subsequently had found unreasonably high. In both cases, the respective Appeals Courts merely remitted shipper plaintiffs to their statutory reparations remedy. Thus *Mohasco* and *Associated*, like *San Antonio, supra*, are inapposite where, as here, a shipper initially raises its unreasonableness claims as a defense to a carrier's undercharge suit.

The objective of Petitioners, in suggesting that Respondent pay the alleged undercharges to Petitioners and then seek reparations in a proceeding before the ICC, is all too obvious. Petitioners are attempting to maneuver Respondent into the position of a post-bankruptcy unsecured creditor with no recourse even if the ICC were to determine that the rates herein are unlawful. The statutory remedy of reparations envisioned by 49 U.S.C. § 11705(b)(3) would be frustrated if a shipper were to be required to pay first and seek relief later, when the carrier is in bankruptcy.

An analogous situation was presented to the ICC in *Glama Dress Co. v. Mid-South Transports*, 335 I.C.C. 586 (1969). In *Glama*, it was claimed that the two-year statute of limitations for filing a reparations complaint at the I.C.C. barred the shipper from seeking reparations in defense to an action for additional freight charges brought within three years under 49 U.S.C. § 11706(a). The ICC held, at 589:

> "Under [the motor carrier's] interpretation of the involved statutory provisions a shipper who has paid what it considers the proper rate or charge would be foreclosed from a possible meritorious defense to a court action anytime the carrier sues for undercharges after the 2-year period specified in section [11706(c)(2) for reparations actions by shippers] has expired. We recognize that the Commission has no jurisdiction to award damages for unreasonable or discriminatory rates under part II of the act. The Supreme Court, however, in dealing with the statute-of-limitation provisions in section 16 of part I of the act, stated in *United States v. Western Pac. R. Co.*, 352 U.S. 59, at page 72 that: '[o]nly the clearest congressional language could force us to a result which would allow a carrier to recover unreasonable charges with impunity merely by waiting two years before filing suit.' "

Requiring Respondent to pay the additional charges sought herein to Oneida's Trustee would produce the very result proscribed by this Court in the *Western Pacific* decision quoted, and followed, by the ICC in *Glama*.

Conclusion

The Second Circuit properly has concluded that Respondent has a right to be heard on its defenses to this action for undercharges based on Oneida's filed tariff rates. The District Court below improperly deprived Respondent of this opportunity by granting Petitioners' motion for summary judgment, without an opportunity for discovery. The Appeals Court's decision is not in conflict with this Court's recent decision in *Maislin*, which recognizes and reaffirms the right of shippers to a determination by the ICC of the reasonableness of carriers' rates and tariff-related practices.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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